IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 917 of 1985

For Approval and Signature:

Hon'ble MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

CHHAGANBHAI B WAGHELA

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Appeal No. 917 of 1985

MR NITIN M AMIN for Petitioner No. 1

MR HH PATEL, APP for Respondent No. 1

CORAM : MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 11/1/2002

CAV JUDGEMENT

1. The appellant has approached this Court by filing this appeal for challenging the judgment and order of conviction and sentence passed by the Ld. Addl. City

Sessions Judge, 12th Court, Ahmedabad City in Sessions Case No. 61/1985 dated 27th September, 1985. The appellant has been convicted for the offences made punishable u/S. 304 Part-II and section 148 of the Indian Penal Code (for short 'IPC') as well as section 135 (1) of the Bombay Police Act. For offence u/S. 304 Part-II of the IPC he has been sentenced to undergo RI for five years and to pay fine of Rs.500/-, in default to undergo further RI for a period of six months, for offence u/S. 148 of the IPC he has been sentenced to undergo RI for period of one year and six months and lastly for offence u/S. 135 (1) of the Bombay Police Act he has been sentenced to suffer RI for six months.

2. The prosecution has put up a case that on 22nd April, 1985 at about 8.00 p.m. a crowd had collected near Jahawar chowk in Nava Vadaj locality. During that time the police force of Ahmedabad city had abstained from performing its duty because of the death of a member of the police force in one of the incidents of rioting. The police had also entered into direct conflict with the general public. In this incident deceased Nirmalsing was surrounded by the crowd and he was assaulted by some of the members with deadly weapons like pipes, sticks and knife. He was riding a motor bike when the assault took place and he was injured, but he could manage to escape and he straight way went to the house of his friend Mahendrasing. He narrated to Mahendrasing the incident, who with the aid of some others removed the injured to Sabarmati hospital. On examination the Medical Officer on duty found the condition of Nirmalsing quite serious and, therefore, he advised to take the injured to V.S. Hospital. Accordingly Nirmalsing was brought to V.S. Hospital in ambulance and was admitted there. The injured during this time revealed to Mahendrasing and others that it was the appellant who had given him knife blow, whereas the other members of the crown had caused him injuries by means of pipes and sticks. In the V.S. Hospital the police constable on duty Narvatbhai Maganbhai received message from the CMO at about 5.55 p.m. on 23rd April, 1985 that one Nirmalsing had received injuries in an incident of rioting. He immediately transmitted the message to Sabarmati Police Station on 23rd April, 1985 informing police constable Dilubha Narubha that one Nirmalsing residing at Nava Vadaj was injured by knife on his chest and right hand by mob of people on 22nd April, 1985 around 9.00 p.m. in Kabir Chowk locality at Sabarmati and he has been admitted in Ward No.3, therefore, appropriate steps may be taken. On receipt of this information Dilubha recorded it in the Vardhi book. Also on receiving the

information Dilubha handed over the copy thereof to H. Gusanilal, who carried it with him to V.S. Hospital. He thereafter recorded the complaint of Nirmalsing and on completion of investigation, submitted chargesheet in the concerned Court which committed the case to the Court of Sessions as the offence u/S. 302 of the IPC is exclusively triable by the Court of Sessions.

3. At the time of trial the Ld. Judge framed the charge against the appellant at Exh. 1 dated 19th August, 1985. The appellant was charged with committing offence u/S. 302 and also for offences u/Ss. 147 and 148 of the IPC.

4. In support of its case the prosecution has mainly relied on the evidence of Kantilal Nathalal P.W.8 Exh. 38, Mahendrasing Kartarsing P.W.11 Exh.42, Dr. Shashikant K. Nigam P.W. 1 Exh.15 and it has also placed reliance on certain documentary evidence such as the first information report, Vardhy given from the V.S. Hospital, post mortem notes, etc. On completion of the recording of the evidence, the Ld. Judge came to the conclusion that the prosecution had failed to prove offence punishable u/S. 302 of the IPC against the appellant, but it had been successful enough to establish beyond reasonable doubt that the appellant had committed offence u/S. 304 Part-II of the IPC and that he had also committed offence u/S. 148 of the IPC for which the aforesaid sentences have been passed against appellant.

5. At the hearing of the appeal Mr. Nitin Amin, Ld. counsel for the appellant has submitted that the prosecution has not proved the guilt of the appellant beyond reasonable doubt and hence the judgment and order of conviction and sentence passed by the Ld. trial Judge are erroneous and not legal and, therefore, this appeal requires to be allowed. He has further submitted that the evidence led by the prosecution in support of its case does not inspire confidence in as much as the prosecution witnesses do not appear to state the truth before the Court. He has further submitted that inspite of ample opportunity available with prosecution witnesses like Kantilal and Mahendrasing to disclose the name of the assailant at the earliest, the same has not been done, but for the first time his name has been disclosed at the time of recording of the FIR i.e. almost after 24 hours which factor heavily weighed against the prosecution. He has further submitted that Kantilal Nathalal Rami, the so called sole eye witness in this case, is a got up witness and he has come to depose against the appellant only with a view to oblige the

prosecution. He has further submitted that though Nirmalsing was fatally wounded and despite the adequate opportunity the Investigating Officer has not arranged to get his dying declaration recorded. Lastly he has submitted that all these factors render the case of the prosecution doubtful and as a natural consequence thereof, the benefit should go to the appellant. As against that, the Ld. APP for the State Mr. H.H. Patel has submitted that the prosecution has been successful by leading cogent and reliable evidence to establish the guilt of the appellant and this appeal therefore does not have any merit and it deserves to be dismissed. Both the learned counsels have taken me through the entire record of the case and with a view to appreciate their rival contentions I have carefully scrutinised and reappreciated the evidence of the prosecution witnesses as well as the documentary evidence on record.

5.1. Kantilal Nathalal Rami P.W. 8 Exh. 38 has been examined by the prosecution, as according to the prosecution he was very much present at the time of incident in which Nirmalsing received injuries. According to this witness, on 22nd April, 1985 between 8.00 and 9.00 p.m. he had gone to a Pan Galla to purchase Beedi in Kabir chowk locality. At that time he saw a crowd at the distance of about 30 mtrs. from the place he was standing. The crowd had surrounded one person belonging to Shikh community who was driving his motor cycle. According to this witness, he had identified the Shikh gentleman as he frequently visited the house of one Mahendrasing. He has further stated that with a view to save Nirmalsing he entered the crowd. According to this witness, at that time the members of the crowd were beating Nirmalsing from behind. He also saw the appellant assaulting Nirmalsing with knife and Nirmalsing with a view to ward of the blow raised his hand, the knife blow therefore fell on the hand. The witness asked Nirmalsing to run away and he also gave a push to his motor bike from behind. At that very moment the appellant gave a second blow with knife which fell on the chest region of Nirmalsing. According to this witness, he could manage Nirmalsing to get out of the crowd and Nirmalsing thereafter proceeded towards Jawahar chowk. The witness has further stated that he thereafter got scared and immediately went home. According to him he had identified the appellant who had assaulted Nirmalsing with knife, but he had not identified other members of the crowd. The other members of the crowd had assaulted Nirmalsing with sticks and pipes. He has further stated that on the next day of the incident

Mahendrasing met him and he told him about the incident. He also told him that the appellant had assaulted Nirmalsing with knife. The statements of these witnesses were recorded on 24th April, 1985 and 26th April, 1985. In the cross-examination by the defence this witness has stated that his wife Vinayvanti is serving in the police department as woman police for the last 8 to 9 years. Initially for about 5 years she had discharged duties in Sabarmati Police Station, but at the time of incident she was attached to the office of the Commissioner of Police at Shahibaug. He has further stated that Mahendrasing had met him on the next day at about 11.00 O'clock while he was standing near his house. He has also stated that Jawahar Police Chowky is situated at the distance of about 40 mtrs. from the house of Mahendrasing and the Sabarmati Police Station is situated at 8 to 10 minutes walking distance. He has further stated that from his house the Pan Galla named Banarasi Pan House where he had gone to purchase Beedi on the night of incident is situated at a distance of about half kilometer and he has admitted that normally he did not go to that Pan Galla for purchasing Beedi but on that day since other Gallas were closed, he has gone there. He has further admitted that this was the first occasion on which he had gone there to purchase Beedi. He has also stated that on that day in the entire city of Ahmedabad there was police unrest and since the afternoon incidents of rioting had broken out between the police and public in the various parts of the city. In Sabarmati locality it had started since 4 to 5 O'clock in the evening. He has, however, stated that he did not know that on account of these incidents of rioting all the shops of Sabarmati area had been closed. According to the witness, he has never talked about the incident to any body and it was for the first time that he talked about the incident to Mahendrasing on next day. He had talked about the incident on second occasion only on 24th April, 1985 in police station and in between he had also no occasion to talk about this incident to any one. He has admitted in his statements recorded on 24th April and 26th April that he had not stated that he had talked about the incident to Mahendrasing. He has, however, further stated that since police did not ask him he had not stated so. He has further stated that on the date of incident when he went home his wife did not meet him but she met him only at 2.00 O'clock in the afternoon on 23rd April, 1985. He has stated that he did not have any close relation with Mahendrasing, but he was simply acquainted with him. He has also admitted that from the place where the incident took place while going home he would come across the house of Mahendrasing as well as Jahawar Police Chowky,

which is under jurisdiction of Sabarmati Police Station. In the cross-examination he has also stated that the crowd was of about 15 to 30 persons and many persons of the crowd were having sticks and pipes with them. He has stated that people armed with pipes and sticks had beaten Nirmalsing from behind. He has admitted that in the police statement he had not stated that since the members of the crowd were beating Sardarji with sticks and pipes and he asked him get out of the crowd and to help him he gave push with his leg to the motor bike from behind. He has also admitted that in his police statement he had not stated that since Nirmalsing was visiting Mahendrasing he knew Nirmalsing. He has further stated that at some distance from Mahakali temple after leaving the tar road the houses of Harijans are situated and the appellant was residing there. He has, however, stated that he did know whether the appellant had observed Dharna against the police station in connection with the dispute regarding the hutments of the Harijans. He has further stated that his wife was with him from 2.00 O'clock in the afternoon of 23rd to the morning of the following day. Lastly he has stated that his statement was recorded by the police after 12.00 O'clock on 24th April, 1985. He had gone to the police station for giving the statement since police had called him there.

5.2. The prosecution has thereafter relied on the evidence of Mahendrasing Kartarsing P.W. 11 Exh. 42. In the examination-in-chief he has stated that deceased Nirmalsing Sardarsing was his distant relative. On 22nd April, 1985 Nirmalsing had gone to his place at about 9.00 p.m. At that time his condition was serious. He had received knife blow on the left hand side of the chest and he had also received injury on the palm of the right hand. On inquiry Nirmalsing told witness that he was injured by the appellant. He further told that he was also beaten by the members of the crowd with sticks and pipes. According to this witness, Nirmalsing was made to lay down on a cot and he and others carried Nirmalsing on cot to Sabarmati hospital. At the Sabarmati hospital after giving preliminary treatment the Medical Officer informed them that the condition of the patient was serious and hence he was forwarding the patient to the V.S. Hospital. When Nirmalsing was admitted in the V.S. Hospital this witness spent whole night with him. He had also informed relatives of Nirmalsing about the incident and on the next day morning at about 7.00 a.m. he went home. He has further stated that on 24th April, 1985 witness Kantilal had met him. He has stated in the cross-examination that in the year 1982 there was a quarrel between the members of his

family and the members of the Harijan community, but the same was later on settled. According to him, there were marks of injuries on the back of Nirmalsing with pipes and sticks. He has admitted that he did not talk about the incident to any one in the house and according to him the injured was immediately required to be taken to the hospital. He had not talked about the incident to any one except Sardarsing Mulasing till the night of the next day when the police had gone to record his statement. He has further stated that in the year 1982 a quarrel had taken place between his family and the members of Harijan community and the police then had filed a case against them.

6. Considering the evidence of the two main witnesses of the prosecution, it becomes clear that the prosecution has not been able to prove conclusively that both these witnesses were telling the truth and that their evidence could be safely relied on. So far the first witness is concerned, his presence at the time of incident near the Pan Galla itself becomes doubtful by virtue of the fact that this shop is situated at half kilometer's distance from the house of this witness. It has come in his evidence that on that day incidents of rioting between the police on one side and the public on the other had started occurring all over the city since the afternoon and in the Sabarmati area it had started around 4 to 5 p.m. Though this witness has said that he did not know whether any shops were opened in this area on account of the police unrest he came there to purchase Beedis. It is therefore, very strange that the witness would come to a place where he had never gone before to purchase Beedi on the ground that the other Gallas were closed. It is highly improbable that when the shops in other parts of the city were closed, this particular shop was open to enable this witness to purchase Beedi from there. It is a matter of common knowledge that in such situation no shop owner, if he sees a crowd of 30 to 35 persons armed with deadly weapons just in front of his shop would continue to keep the shop open. Secondly the witness who had never gone to this shop before in his life would go to purchase Beedi to this shop. Thirdly the witness would venture to enter the crowd to save a person who is hardly known to him. In fact the prosecution's case is that this was a police unrest and no particular community or member of the community was the target. Kantilal, therefore, had no reason to jump into the fray solely with a view to help Nirmalsing. It may also be noted that conduct of this witness after the incident is also not natural. According to him he had entered the crowd with a view to save Nirmalsing because

Nirmalsing often came to house of Mahendrasing who was known to the witness. However, while going home he did not try to contact Mahendrasing and inform him about the incident nor he goes to Jahawar police chowky which is also situated on his way to home. Not only that but he does not talk about the incident to any of his family members and not even to his wife when she returns at about 2.00 p.m. next day and remains with him till she goes to attend the duty on the morning of 24th. It may also be remembered here that wife of this witness is a woman constable and is attached to the office of Commissioner of Police at Shahibaug. Thus, the evidence of this witness does not inspire enough confidence to base conviction on his evidence alone.

6.1. Next witness is Mahendrasing P.W. 11 Exh. 42. His evidence is also not very trustworthy in as much as though Nirmalsing arrived there immediately, the name of the assailant was not disclosed to him. He, however, states that Nirmalsing has told him about the assault by the appellant with knife. However, if this version is compared with the first information given by the deceased himself before the police, it becomes very clear that the deceased Nirmalsing had immediately collapsed after reaching house of Mahendrasing and had become unconscious. Hence he had not told anything about the incident to Mahendrasing. At this juncture it may also be noted that though Mahendrasing was the person who took Nirmalsing to the hospitals, firstly at Sabarmati hospital and later on to the V.S. hospital, has not disclosed the name of the assailant though he was specifically asked by the Medical Officers about the history of the incident. If he had known the name of the appellant, he would have certainly disclosed it before the Medical Officer. Even in the Vardhi sent by the duty constable at the hospital to Sabarmati Police Station, no mention of the name of the appellant is made in the said Vardhi. It is difficult to believe that through oversight these witnesses might not have disclosed the name of the appellant either to the police or to any of the relatives or to the Medical Officers. Therefore, only one inference can be drawn that till the FIR was recorded name of the appellant was not available with the prosecution witnesses. It may also be stated her that the evidence of the so called eye witness and that of Mahendrasing is not in consonance with the medical evidence. Both these witnesses have vehemently stated before the trial Court that Nirmalsing was extensively beaten on the back by the members of the crowd with pipes and sticks. However, no such injury has been found on his back. If a person is assaulted by a furious crowd

with deadly weapons he is bound to sustain serious injuries on that portion of the body. It is, therefore, clear that the prosecution witnesses have not stated the correct facts but they have deliberately deposed against the appellant to help the prosecution.

7. The other evidence if carefully considered, it raises great doubt regarding the bonafide of prosecution's case. When Nirmalsing was admitted in the hospital Vardhi was sent to the Sabarmati Police Station wherein no name was disclosed nor police have bothered to get the dying declaration of the deceased recorded. Though there was ample scope and enough time at the disposal of the Investigating Officer to call the Executive Magistrate and to record the dying declaration, he did not feel any necessity of getting the dying declaration recorded merely because he felt that the condition of the deceased was good. When in the opinion of the Medical Officers the condition of Nirmalsing appeared to be quite grave there was no earthly reason for the Investigating Officer to take a contrary opinion. It is also not understood why the FIR came to be recorded at a belated stage. It is in evidence that the police officers of Sabarmati Police Station had not abstained from discharging their duty and they were very much available there. The deceased was admitted to V.S. Hospital on the very same night i.e. in the night of 22nd April, 1985 and on 23rd April, 1985 Mahendrasing was very much available at home and according to prosecution Nirmalsing had disclosed the name of the appellant. Even Nirmalsing himself was available to give the first account of the incident. Inspite of that no arrangement to record the FIR has been made in time. No plausible explanation has been offered by the prosecution for the delay. Not only that but as I have stated above, in the Vardhy despatched by the constable on duty at the hospital to Sabarmati Police Station name of the assailant is not disclosed. The cumulative effect of all these factors give rise to grave suspicion regarding truthfulness of the prosecution case.

8. The prosecution has also relied on the evidence of certain other witnesses, but looking to their evidence I do not find it necessary to discuss it in this judgment, as this evidence does not take the case of the prosecution any further.

9. Both the counsels have cited various authorities in support of their contentions, but since the principles are well known and I have kept them in mind while reappreciating the evidence of the prosecution, the same

are not required to be discussed here.

10. Considering the evidence on record, I strongly feel that the case of the prosecution is not free from doubt and as a natural consequence thereof, its benefit should go to the appellant. In other words, the prosecution has not been able to prove its case against the appellant beyond any reasonable doubt and the appellant deserves to be acquitted by giving benefit of doubt. In the result, this appeal deserves to be accepted. The judgment and order of conviction and sentence passed by the Ld. Addl. City Sessions Judge deserve to be quashed and set aside.

11. In the result, the appeal is allowed and the judgment and order of conviction and sentence passed by the Ld. Addl. City Sessions Judge dated 27/9/1985 in Sessions Case No. 61/1985 are hereby quashed and set aside. The appellant is on bail and, therefore, his bail bonds will stand cancelled.
Muddamal to be disposed of in accordance with the directions given by the trial Court in the impugned judgment.

[AKSHAY H. MEHTA, J.]

* Pansala.